

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

RUTH JORGENSEN and STANLEY
JORGENSEN, wife and husband,

Appellants,

v.

KELLY KEBLER and JOHN DOE KEBLER,
wife and husband, and the marital community
composed thereof,

Respondents.

No. 38513-9-II

UNPUBLISHED OPINION

Armstrong, J. — Ruth and Stanley Jorgensen appeal from an order dismissing their personal injury claim against Kelly and John Doe Kebler because of improper service of process. The issue is whether the Jorgensens established that the Keblers left the state of Washington with the intent to avoid service of process, which would allow the Jorgensens to use substitute service by publication under RCW 4.28.100(2), and to toll the statute of limitations. We agree with the trial court that the Jorgensens did not prove the necessary intent. Accordingly, we affirm.

FACTS

The Jorgensens are Washington residents who filed a complaint for damages against Kelly Kebler and John Doe Kebler on April 11, 2007. The Jorgensens allege that Ruth was injured in a car accident with Kelly on July 21, 2004, in Bremerton, Washington. The Jorgensens hired a process server, Ken Palmer, to locate Kelly and serve the summons. Palmer first attempted to serve Kelly at her last known address in Bremerton, Washington, but she no longer lived there. The resident at that time explained that she had been receiving mail for the Keblers for two years. Palmer then searched Washington State databases¹ and found a new Bremerton address for Kelly,

but she had left this address as well. The resident told Palmer that Kelly had likely moved to Montana. When Palmer sent postal tracers to both Bremerton addresses, they came back, “Mail delivered as addressed.” Clerk’s Papers at 35.

Palmer also checked with the Washington State Department of Motor Vehicles, finding no vehicles registered to Kelly. The Department of Licensing had a record of an identification card issued to Kelly, but there was no date of issue, expiration date, or address for Kelly on file. When Palmer ran Kelly’s name, date of birth, and social security number through a national credit database, it showed that she was living in Montana.

Based on the Jorgensens’ inability to locate Kelly, they filed a declaration for service by publication, stating that the process server could not locate Kelly at her last known residence and that the Kebblers had either left the state or concealed themselves with the intent to avoid service of process. The Jorgensens filed an amended declaration of service by publication on December 14, 2007.

The Kebblers moved for summary judgment on February 7, 2008, arguing that the Jorgensens failed to exercise sufficient diligence in attempting personal service before seeking service by publication. The Kebblers asserted that the Jorgensens had not timely served them and, therefore, the Jorgensens’ claims were barred by the statute of limitations.² The trial

¹ The specific Washington State databases used are not identified in the record.

² The statute of limitations for the Jorgensens’ personal injury claim ran out on July 21, 2007, three years after the car accident. RCW 4.16.080(2).

court granted the Kebblers' motion and dismissed the Jorgensens' action.

ANALYSIS

A trial court properly grants a motion for summary judgment where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). We review an order on summary judgment de novo, viewing the facts in the light most favorable to the nonmoving party. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). When responding to a motion for summary judgment, the nonmoving party must come forward with "specific facts sufficiently rebutting the moving party's contentions and disclosing the existence of a material issue of fact." *Heath v. Uraga*, 106 Wn. App. 506, 513, 24 P.3d 413 (2001).

Service of process is critical to personal jurisdiction. *Pascua v. Heil*, 126 Wn. App. 520, 526, 108 P.3d 1253 (2005) (citing *Painter v. Olney*, 37 Wn. App. 424, 427, 680 P.2d 1066 (1984)). Substitute service by publication under RCW 4.28.100(2) requires the plaintiff to set forth "(1) that the defendant could not be found in Washington after a diligent search; (2) that the defendant was a resident of Washington; and (3) that the defendant had either left the state or concealed himself [or herself] within it, with intent to defraud creditors or avoid service of process." *Pascua*, 126 Wn. App. at 526-27 (citations omitted). We strictly construe the terms of the statute. *Bruff v. Main*, 87 Wn. App. 609, 612, 943 P.2d 295 (1997) (citing *Kent v. Lee*, 52 Wn. App. 576, 579, 762 P.2d 24 (1988)). To perfect service by publication, plaintiffs must show by specific facts that they made a diligent effort to find the defendant before seeking service by publication. *Pascua*, 126 Wn. App. at 527. The facts must clearly support the conclusion that all

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statutory conditions are present. *Pascua*, 126 Wn. App. at 527; *Boes v. Bisiar*, 122 Wn. App. 569, 577, 94 P.3d 975 (2004) (quoting *Bruff*, 87 Wn. App. at 612).

Over the course of about two-and-a-half years, Kelly moved from one location in Bremerton to another and then to Montana without leaving a forwarding address. She did not have a driver license while in Washington or a registered vehicle. These facts alone do not show Kelly intended to avoid service of process for a lawsuit brought nearly three years after the accident. There is no evidence that she even knew that the Jorgensens were pursuing an action against her. *See Pascua*, 126 Wn. App. at 531 (finding no attempt to avoid service when defendant was unaware of plaintiff's suit or attempted service). The statute does not authorize alternative service simply because the defendant cannot be found. *Kent*, 52 Wn. App. at 579. Furthermore, an individual's absence from public records does not establish his or her intent to avoid service; facts must clearly suggest the intent required by RCW 4.28.100(2). *See Bruff*, 87 Wn. App. at 613-14. We agree with the trial court that the Jorgensens did not make the necessary showing here.

The Jorgensens argue, nonetheless, that because they could have served the Kebblers under RCW 46.64.040, which does not require proof that the defendant has left the jurisdiction to avoid service, we should relax the standards for proving intent under RCW 4.28.100. But the two statutes serve different purposes. RCW 4.28.100 authorizes service by publication for any type of civil claim when its requirements are met. When applied to a nonresident, RCW 4.28.100 requires a showing that the nonresident has certain contacts with the state, for example ownership of property in the state. RCW 4.28.100(1)(3). Such contacts establish the state's personal

jurisdiction over the nonresident within the bounds of due process. RCW 4.28.185. RCW 46.64.040, on the other hand, establishes the state's jurisdiction over a nonresident for claims arising from an auto accident within the state. It provides that a nonresident appoints the secretary of state as the nonresident's agent to accept service for claims arising out of the nonresident's use of the state's highways. RCW 46.28.100. Thus, the statute has a much more narrow focus than RCW 46.64.040. And the legislature drafted each statute with a view to meeting due process standards. *See Island County v. State*, 135 Wn.2d 141, 147, 955 P.2d 377 (1998) ("We assume the legislature considered the constitutionality of its enactments and afford some deference to that judgment."). We are not free to mix the standards of the two statutes to reach the result the Jorgensens urge.³ We conclude that the trial court did not err in granting the Kebblers summary judgment.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Hunt, J.

Van Deren, C.J.

³ The Jorgensens conceded at oral argument that they could have used the nonresident motorist statute to serve Kebblers.